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NO. 668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 480, AFL-CIO-CLC ..... Petitioner

vs.

GULF COAST BUILDING AND SUPPLY COMPANY, INC. ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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pursuant to 29 USC § 187, was violative of the intent of the Congress to protect the union's traditional and permissible primary activity, as announced in 29 USC §§ 157 and 163; and the decision below is also in conflict with federal labor policy, decisions in other circuits, and with the principles clearly established by this Court in particular in *Denver Building and Construction Trades Council* and *International Rice Milling Company* 24

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above entitled case on June 19, 1970.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Mississippi is reported as ..... F. Supp. ....., 71 LRRM 3212, 60 LC ¶ 10,330 and is reproduced as Appendix D. The opinion of the Court of Appeals for the Fifth Circuit, which is reprinted in Appendix B, is not yet officially reported, but is unofficially reported at 74 LRRM 2865, 63 LC ¶ 10,980.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1970. This petition was filed within ninety days of that date. Jurisdiction is conferred on this Court by 28 USC § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the summary sua sponte exclusion by the district court judge of a class of all union members from the petit jury panel during voir dire examination in a § 303 suit is violative of the declared policy and purposes of the Congress in the plain provisions of the Jury Selection and Service Act of 1968, Public Law 90-274, 28 USC §§ 1861-1869, 1871.

2. Whether a labor union engaged in a dispute with a primary employer at a common construction site is under a legal duty to seek out all employees and suppliers of secondary employers who refuse to cross the union's picket line, which in all respects complied with the Moore Dry Dock Standards, and instruct such employees and suppliers to return to work and to cross the union's picket line, in order to avoid violating 28 USC § 158(b) (4) (i) (ii) (B), and in order to escape liability in damages pursuant to 29 USC § 187.

STATUTES INVOLVED

The pertinent portions of the Jury Selection and Service Act of 1968, Public Law 90-274, 82 Stat. 54, 57-62, 28 USC §§ 1861-1869, 1871; National Labor Relations Act, as amended, 29 USC §§ 157, 158(b)-(4) (i) (ii) (B) and 163, 187; are set out in Appendix A.

STATEMENT OF THE CASE

Gulf Coast Building and Supply Company, Inc., (Gulf Coast) filed its two count complaint against the In-

ternational Brotherhood of Electrical Workers, Local 480, AFL-CIO, (Local 480) on March 9, 1967 (A.1-4). The jurisdiction of the United States District Court was stated therein as 29 USC § 187. In the first cause of action, Gulf Coast charged that Local 480 since February 28, 1967, had engaged in, induced and encouraged individuals employed by persons engaged in commerce, to strike and refuse to perform services; threatened, coerced and restrained persons engaged in commerce all with an object of requiring (1) Gulf Coast to cease doing business with Gulf Electric Construction Company, Inc. (Gulf Electric); and (2) requiring Wood Mechanical Contractors (Wood), Delta Steel Company (Delta) and other employers to cease doing business with Gulf Coast; for which damages in the amount of $100,000 were demanded. In the second cause of action, Gulf Coast charged that Local 480, maliciously by use of force interfered with Gulf Coast's right to conduct its business of constructing the Tracetown Shopping Center in Natchez, Mississippi; and for which it demanded damages in the sum of $250,000.

On April 22, 1969, trial was begun in Vicksburg, Mississippi. The trial judge placed the whole venire in the jury box and began a voir dire examination of the petit jury members. During the course of his voir dire examination the trial judge suddenly demanded that every member of the panel who was a member of a trade union hold up his or her hand. Approximately six male members of the jury panel held up their hands. Without further examination of these members of the panel, and with no expression whatsoever from any members of this class of any nature, the trial judge, *sua sponte*, excused the entire class of union members. None of the excused group was a member of Local 480. No

explanation of his actions in excusing the entire class of union members was made at that time. The judge did not state that he believed the group as a whole or any individual thereof was not fully qualified or that any Jury Panel member may have been biased. When the union members filed out of the box and left the courtroom the judge continued and concluded his voir dire examination. He then permitted counsel for the plaintiff and defendant to conduct an abbreviated voir dire examination severely limiting the scope and range of such examination. On that date and at that time no opportunity for objection was afforded and no objection was made. However, Local 480 did object in its motion for a directed verdict and for a new trial on April 28, 1969. (A.201-204).

The evidence revealed that on February 8, 1967, John Erickson, Business Manager of International Brotherhood of Electrical Workers, Local 480, a building and construction craft union, received a letter from Leslie L. Flowers, a non union electrician, containing copies of his payroll checks from Gulf Electric Company (Gulf Electric) (A.403).[1] These checks revealed that Flowers was being paid at the rate of $3.50 an hour. The hourly rate at that time for journeymen electricians, members of IBEW Local 480, was $4.30 (A.403).

Upon investigation, Erickson found that Gulf Electric, whose principal place of business is Crestview, Florida, was the electrical subcontractor doing the rough-in masonry electrical work on the Tracetown Shopping Center (A.231; 234).

Tracetown was being constructed in Natchez, Mississippi, by the Gulf Coast Building and Supply Com-

[1] "A" refers to the appendix record in the Circuit Court of Appeals for the Fifth Circuit.

pany, Inc. (Gulf Coast), an Alabama corporation (A. 225). Gulf Coast was one of the owners as well as the General Contractor of Tracetown. Construction of Tracetown started in December, 1966, and Gulf Coast primarily used local labor furnished by the local trade unions (A.234).

On January 20, 1967, as Secretary-Treasurer of the Mississippi Building and Construction Trades Council, Erickson wrote to St. John, then Project Manager of Gulf Coast, stating that the State Council would like to work with the General Contractor on the project. Erickson stated that: "Your careful consideration of awarding sub-contracts to qualified contractors who abide by the State and Federal approved apprenticeship training program and pay the prevailing wage scales in the area would be appreciated."

Erickson found that Gulf Electric was not only paying substandard wages, but that the working conditions were also substandard. The electrical contractor was undermining the area wages and working conditions established by members of Local 480 through years of effort (A.403). He presented the findings of his investigation to the members of Local 480, and the membership voted to protest the substandard wages and working conditions of Gulf Electric at Tracetown (A. 404).

On February 28, 1967 (A.234) Local 480 placed a single picket (A.292) at the *only* entrance (A.291) to the *common* job site with a sign stating:

"No dispute with any other Employer. IBEW Local 480 protests substandard wages and conditions at Gulf Electrical Construction Company, Inc., electrical

contractor. No dispute with any other employer" (A.215, 290).

In order to prevent violence and any type of disorder from developing, the pickets were instructed to walk in a mannerly way, not to block traffic; not to keep anyone from going in or out; not tell anyone they could not go in; and to show the picket sign if questioned (A.443). At no time did the pickets ask *anyone* not to cross the picket line; nor did the pickets, or anyone connected with Local 480, ever ask *anyone* to *cease* doing business with any firm. The pickets remained on duty from 6:45 A.M. until 3:15 P.M. during the five-day work week (A.248). No objection to anyone crossing the picket line during this time was ever made. Only a single picket was ever on duty at any one time.

On March 1, 1967, Walter McCullough, an employee of Delta Steel Company, drove a truck loaded with steel to Tracetown. He was told by the picket that he could cross the picket line if he wanted to (A.322), but McCullough testified that he made the decision on *his own* not to cross the picket line. He called his boss in Jackson and was instructed by his superior not to cross the picket line. McCullough testified that no one induced or coerced him to prevent him crossing the picket line (A.327), that he made up his own mind of his own free will. McCullough was the only person who had any conversation with the pickets from February 28, 1967, to June 23, 1967.

Neither Local 480 nor any person acting for the Union made any contact with any employer or other labor organization during the period from December 1966 to June 23, 1967. Immediately prior to February 28, 1967, Erickson made a one sentence announcement to some business agents of Craft Unions at a morning

meeting of the Jackson Building and Construction Trades Council[2] that Local 480 was going to place an "area standards" picket on Gulf Electric at the Tracetown Project in Natchez.

On March 14, 1967 Gulf Coast constructed a second entrance (A.249, 250) approximately 300 yards south of the original gate. The new entrance was denominated "South Gate". A sign was erected at the South Gate reading:

> "South Gate. Gulf Electric Construction Company, Inc. This entrance reserved for employees of, and carriers of supplies making deliveries to, Gulf Electric Construction Company, Inc."

At the original entrance, now designated "North Gate", a sign was also placed, reading:

> "North Gate. This entrance is reserved for employees of, and carriers and suppliers making deliveries to . . . (names listed). Employees of carriers and suppliers making deliveries to Gulf Electric Construction Company prohibited from using this gate. Employees or carriers of supplies making deliveries to Gulf Electric Company must use South Gate."

There was an arrow pointing toward the South Gate. Upon the establishment of the South Gate, the picket moved from the former location to the new South Gate. While the South Gate was in existence, no picketing was conducted at the North Gate. In early June, Gulf Coast "demolished" the South Gate, leaving the original gate as the only remaining entrance into Tracetown. The pickets of Local 480 then returned to the North Gate.

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[2] Jackson, Mississippi is 120 miles Northeast of Natchez.

Employees of Wood Mechanical Contractors and the employees of other contractors returned to work on March 15, 1967, and continued until the completion of the contracts (A.249-252).

On February 28, 1967, Robert Bruce Worley, assistant vice-president of Gulf Coast, testified that he had supper with his project manager in Natchez, and Erickson was pointed out to him in the restaurant (A.237). Worley said he introduced himself to Erickson and inquired as to the reason for the picket line. Erickson advised Worley that he had told the project manager the reason, it was also on the sign, and he would have his attorney contact Worley. St. John, the project manager, had used rather strong language toward Erickson earlier in the day.

Worley testified that on March 2, 1967, Pyles, Local 480 lawyer, and Mitchell, president of Gulf Coast, had a telephone conversation. Worley said that the lawyer explained to them that Local 480 had established working conditions and wages for a long time in this area and since Gulf Electric was undermining these, the union was protesting Gulf Electric's actions.[3]

Giving hearsay testimony, Worley said that on March 20, 1967, his project manager told him that an official of the concrete supplier had called him and said that "his people would not drive a truck across the picket line" (A.253). The record is completely devoid of any testimony connecting Local 480 in any way with the decision of the supplier and his employees not to deliver the concrete. Worley's testimony is as follows:

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[3] In the early portion of the dispute, Erickson and Pyles believed that Mitchell was the executive officer of Gulf Electric Construction Company, Inc., as shown by the subpoena served to take his deposition in this case. (Record on Appeal; pp. 21, 22).

"Q. Did you check the job on March the 20th? A. Yes, sir, I did.

"Q. What did you find with respect to the job with respect to the concrete work? A. The concrete was scheduled to be placed early in the morning which is the usual procedure in concrete. I had arrived on the job in Natchez, had visited the job to make sure that the schedule was intact, that we were going to have concrete that day and then I left early in the morning to leave town for a short while. I came back later that day, approximately noon, and it was very apparent that we didn't have any trucks or anything pertaining to concrete or that looked like concrete on the job. I became very alarmed and immediately looked for the Project Manager and asked him why we didn't have concrete on the job. He told me that the supplier of the concrete called him and told him that his people would not drive a truck across the picket line." (A.252, 253)

Over repeated objections, Worley was allowed to testify in the presence of the jury to a series of meetings, conferences, and telephone calls with and between Clayton Spillman, business manager of the Laborers' Local Union 747 in Natchez, Ralph Brummett, business manager of the pipefitters Local Union in Jackson and president of the Jackson and State Building Trades Council, Louis Charles Von, project manager of Gulf Coast, Joe and James Wood, owners of Wood Mechanical, subcontractors and Fleming, president of Gulf Electric, and Mitchell. The meetings and conferences began on March 20 and continued through the night of March 22, 1967. The proposals, counter proposals and amend-

ed proposals discussed by this group concerned the replacing of the non-union electricians of Gulf Electric with union electricians from Local 480; the placing of non-union electricians on the payroll of Wood. No representative or agent of Local 480 was present at any of these meetings or had any part therein (A.253-280).

On cross examination Erickson was asked about a long distance telephone conversation with Brummett on March 20, 1967, and about a later telephone call from Brummett. His testimony was as follows:

"Q. Tell what about the telephone call that Mr. Brummett made to you that day. A. He called me at the Beechwood Restaurant in Vicksburg, Mississippi where I was at.

"Q. All right. Now, tell us what Mr. Brummett said to you? A. He wanted to know if they had a meeting down there if there was any way we could settle it and I told him it was if they would pay the wage scale and working conditions of our Local.

"Q. Did Mr. Brummett tell you he had made a proposal to Mr. Worley whereby Mr. Worley would put one or two of your men to work and you objected to that? A. I told him I would not put anybody out there to work . . .

"Q. Did Mr. Brummett ask you anything about letting the Foreman of Gulf Electric work on a permit from your union? A. Yes, he did. Q. What did you tell him? A. I told him all I wanted was the wage scale and the working conditions of our Local.

"Q. Did you authorize Mr. Brummett to go back and tell Mr. Worley and Mr. Spillman? A. No

sir, he asked me if I could be at a meeting that afternoon and I told him I could not. . . .

"Q. If Mr. Brummett said he was authorized to represent you, would he be right or wrong? A. He was wrong. . .

"Q. Now later that evening Mr. Brummett called you on the telephone and told you the people had all agreed to put all the men on Wood Mechanical payroll? A. He called me and said they had decided that they would put all the people on Wood's payroll and wanted to know if that was all right with me.

"Q. What did you tell him? A. I told him if they would pay the wage scale and the working conditions it was all right with me." (A.427-429)

Early on March 22, Worley telephoned Erickson and stated that Gulf Electric had worked out an arrangement to pay the union wage rate and adhere to the union working conditions. Relying in good faith on Worley's statement that wages and working conditions of Local 480 would be observed, Erickson ordered the picket removed (A.406).

At the union meeting on the night of March 22, Erickson reported to the membership that Worley had told him in the telephone conversation. After the meeting, Erickson received a telephone call which informed him that the plan instigated by Worley had not materialized as had been represented to Erickson by Worley. The Executive Committee of Local 480 ordered the picket line to again be placed on the project. (A. 406)

Erickson went to Natchez to the picket line at the South gate on the morning of March 23. Worley met

him there and invited him to the office. Present at this meeting also were Fleming and another official of Gulf Electric.

Worley and Fleming told Erickson that it had proved impossible for Wood and Gulf Electric to work out the agreement suggested by Worley. Fleming asked Erickson to suggest any other plan. Erickson replied that if Gulf Electric would pay the wage scale and live up to the working conditions of Local 480 that the dispute would be settled. He explained that he would not and could not refer Local 480 members to the job, because he had no member electricians available for assignment because of the unusual amount of construction work being done in the jurisdiction of Local 480 at that time. Worley and Fleming then had a discussion among themselves as to whether Gulf Coast would pay to Gulf Electric the difference in the labor costs which would result in the payment to Gulf Electric's employees of the Union wage rate. Worley was noncommittal, saying that before he would agree to pay the increased contract price, he would have to know the amount. Fleming and his fellow official stated that they would get in touch with their home office in Florida and give Worley an estimate during the day. Erickson stated that he wanted to talk to the Union's lawyer in order to secure a written agreement with Gulf Electric to pay the wages and observe the working conditions, and to include the settlement of the §303 damage suit in the settlement agreement. He left the meeting and attempted to contact his lawyer but found that the latter was out of the State and not available. Erickson returned to Worley's office to report on his efforts to contact his lawyer. Worley's secretary informed Erickson that Worley was in conference and could not be disturbed. Erickson

asked the secretary to tell Mr. Worley that he had not been able to contact his lawyer, and because of the lateness of the day, he was returning to Jackson. He never again heard from Worley. Gulf Electric did not pay its employees the area wage scale established by the union nor did the contractor live up to the working conditions of the Union (A.407-410).

Abner Cage, a black worker, was called as a witness for Gulf Coast, and testified that he was a member of Laborers Local 747 in Natchez (A.329). Some time before February 28, he was sent by the union to the Tracetown Project to work for Gulf Coast (A.329, 330). On February 28, he went to work and discovered that there was a picket line at the only entrance to the project. He had heard nothing of the dispute prior to that time (A.330). However, he did not cross the picket line at that time, and did not talk with the pickets nor did they say anything to him. The pickets in no way threatened or coerced him. The decision not to cross the picket line was his own (A.339, 340). Cage had no knowledge of Local 480, and at the time of the trial he did not know "for sure" what it was (A.340). He returned to work after about two weeks (A.331) driving through the North gate (A.331, 332, 340, 341). There was no picket line at the North gate (A.341), but he saw the picket line at the South gate. Over the objections of Local 480, Cage was permitted to testify that he was charged, tried and fined by Laborers' Local 747 for working behind the picket line.

Local 480 had no connection with the trial of Cage by Natchez Laborers Local 747, and objected to the prejudicial testimony being presented to the jury. In overruling the objection, the trial judge commented in the presence of the jury:

". . . I think everybody knows pretty generally that each one of these labor unions respect the rights and pickets of others and that's a perfectly natural consequence of anybody's picket there that any other labor union is going to respect that picket, so I'll overrule your objection. That's the reason we've got pickets. . . .

". . . and I'm admitting it for the purpose to show the effect it has on anybody having up a picket line on anybody belonging to a labor union, and you may have a continuing objection and your objection is overruled . . . .

"I don't believe there is any difference between objective and effect, that's a little bit too fine for me." (A.332-335)

In order to be sure that the Moore Dry Dock standards were met, Local 480 kept written records of persons going in and out of the South (Gulf Electric) gate (A.471). The record does not reveal that any person ever saw the pickets making the record, or that any one was influenced not to enter the project because of the record.

All witnesses testified that they crossed the picket line with no difficulty or interference (A.344, 345, 347, 348). At all times the picketing was conducted in an orderly peaceful manner, until it was voluntarily discontinued on June 23, 1967. From March 14, when the second gate was established, to June 23, as is known, no employers, other than the concrete suppliers, suppliers, or employees refused to go to work because of the picket line.

Gulf Coast completed the presentation of its evidence late in the afternoon of the first day. Local 480 re-

quested that it be allowed to make a motion for a directed verdict (A.400-401). The court refused to permit the motion at that time, stating he would give the union an opportunity to make its motion at a later time, and it was then required to begin the presentation of its case. After the first witness' testimony, the court announced it would hear the Union's motion. He overruled the motion stating:

". . . When a labor union puts up a banner they call, I don't believe it makes any difference what they put on that banner, *its* a labor union banner to be recognized by such, and I don't believe any labor union members would cross that picket line regardless of what's on that banner. You're not being very realistic when you're talking about having something on the banner you say that limited your fight you say to the Electric Company on the job, I doubt that one out of ten labor people would even read that, just see that *its* a banner and they know they are not going to cross it and they know they had better not cross it. I think you're a little naive to assume they are not sanctioning the company the crossing of those lines because labor people and everybody knows that they won't cross them. That's the reason you put your banners up there, you don't want them to cross it. . . ." (A.438-440)

The trial was completed in the afternoon of April 23, 1969. The court gave the jury instructions. Among several instructions given, to which exceptions were taken, Local 480 here specifically objected to three of the instructions requested by the plaintiff and as modified by the court were given to the jury. Instruction No. 1 read:

"Local 480 was under a duty to expressly instruct employees and suppliers of Gulf Coast Building and Supply Company, Inc., Wood Mechanical Contractors, and Natchez Sand and Gravel Company, that they were free to cross the picket line at Tracetown." (A.481, 504)

Instruction No. 2 was in the following language:

"Local 480 was under a duty to instruct employees of Gulf Coast Building and Supply Company who had ceased work, and who refused to cross their picket line as a result of Local 480's picketing, to return to work and cross such picket line without violating any duty to said labor Union." (A.481, 505)

Instruction No. 3 was given as:

"You are instructed as a matter of law that even though defendant's picketing was peaceful and even though its objective or purpose were lawful, still if an incidental, and inescapable, and undeniable purpose, result and effect of the method employed by the Union were to induce or force plaintiff's employees and suppliers not to cross the Union's picket line to serve plaintiff because of a labor dispute of the Union with one of plaintiff's subcontractors, Gulf Electric, then the defendant Union would be liable to the plaintiff in damages therefor." (A.481, 506)

The trial court refused to change any of the instructions despite the exceptions and objections of Local 480. In commenting on the instructions the Court said:

". . . it is not sufficient for a labor union to write on a banner that somebody is unfair and we are having a picket line here but say in any kind of language on that banner said we are not striking against anybody but the electrical Union and in effect you are

saying that you think that has exonerated you from responsibility for carrying a picket at all which has the very natural and everybody knows the inescapable ultimate effect of scaring a Union man to death. He won't cross that line and that's all there is to it. I don't believe that anything less than that an express instruction from a picket who was carrying such a sign as that would ever justify a Union man in crossing one of the lines and that's what I am trying to say. . ." (A.497)

". . . you see that colored fellow (Abner Cage) wasn't an electrical man, he wasn't working for any electrical contractor, and you see what happened to him and it will happen to any laborman and I think every labor union man knows that and they ought to be forthright enough to come in to Court and admit it instead of trying to dodge around and make somebody think that there is something real mystical about it because I don't think that. I have tried hundreds of these cases as an attorney and I have heard the same kind of testimony and I didn't believe it then and I don't believe it now. . . (A.498)

". . . I don't believe that when a picket carries a sign that that carries any kind of immunity with it for somebody who is say not working for the subcontractor that's in the dispute to cross that line and they simply won't do it and I don't believe that you could carry that sign without knowingly in advance and intentionally in advance doing exactly what it accompljshes. (A.499)

". . . The language of the statute is a little bit mild because I don't think anybody by any word of mouth has even sought or any manner tried in this case to induce or encourage but when you bring in the word

force there may be a different answer to that . . . (A.499)

"I don't know of any requirement of the act about anything that the Union is supposed to put on its banner. I think that is entirely up to them about what they put on their banner and I don't believe its necessary for them to put anything, if they carried something that looked like a banner on there, I think it would accomplish its purpose if they didn't have anything on it." (A.500)

The jury found for Gulf Coast and assessed its damages at $38,349.78 (A.198). The judgment of the Court was entered on April 28, 1969 (A.199, 200).

On April 28, 1969, Local 480 filed its motion for judgment in accordance with its motion for a directed verdict or for a new trial (A.201-204).

Among the grounds for the motion Local 480 complained that:

"15. The District Court erred in excusing for cause from the jury panel in this case, all persons who were members of any labor organizations."

The Court, on July 29, 1970, rendered an opinion and entered its order overruling the motion of Local 480 (A.214-219). The Union duly prosecuted an appeal.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals affirmance of the summary sua sponte exclusion by the district judge of a class of all union members from the petit jury panel during voir dire examination in a § 303 suit is violative of the declared policy and purposes of the Congress in the plain provisions of the Jury

Selection and Service Act of 1968, Public Law 90-274, 28 USC §§ 1861-1869, 1871.

The actions of the trial judge and the opinion of the Court of Appeals conflict with the statutes which were effective but apparently were overlooked and ignored by the trial court and the Court of Appeals.

The Court of Appeals has decided the issue of the arbitrary exclusion of a class of all union members from the petit jury panel in a way which violates the intent, policy and purpose of the Congress in enacting the Jury Selection and Service Act of 1968 (28 USC §§ 1861-1869, 1871, as amended Mar. 27, 1968, Pub. L. 90-274, effective Dec. 22, 1968).

This case presents an important question in the administration of the Jury Selection and Service Act of 1968. The decision of the Court of Appeals, if allowed to stand, would sanction circumvention of the policy of the United States and the prohibition against discrimination, which are set out in plain and unequivocal language in §§ 1861 and 1862, as follows:

"§ 1861. Declaration of policy

"It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that *all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States*, and shall have an obligation to serve as jurors when summoned for that purpose.

"§ 1862. Discrimination prohibited

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or *economic status.*" (Emphasis added).

The statutory plan for random jury selection (§ 1863) specifically provides that the source of the names of prospective jurors shall "foster" and "be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title" (§ 1863 (b) (2)); and that the plan shall "specify those groups of persons, or occupational classes whose members shall, on individual request therefor, be excused from jury service . . . only if the district court finds, and the plan states, that . . . excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title." (§ 1863(b) (5))

Section 1865 provides for a determination of the qualifications for jury service on a purely objective basis, "solely on the basis of information provided on the juror qualification form or other competent evidence." The juror qualification form shall request but not require information with respect to the areas in which discrimination is prohibited by § 1862. The form may request, but not require, the "occupation" of a potential juror and must clearly inform the person that the furnishing of any information with respect to "economic status or occupation" is not a prerequisite to his qualification for jury service. (§ 1869(h))

It is clear that the fundamental purpose of the 1968 Act is to assure non-discrimination in federal jury selection and service.

The statutory selection procedures were followed in this case, and a petit jury panel free of the prohibited discriminations appeared for the trial.

On voir dire examination the trial judge elicited the information that certain persons on the panel were members of labor unions and summarily excluded them from service on the jury and dismissed them forthwith, in violation of the policies declared and the rights secured by §§ 1861 and 1862, and contrary to the following express provision of § 1866(c):

> "(c) Except as provided in Section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863(b) of this title, no person or *class of persons* shall be disqualified, excluded, excused, or exempt from service as jurors:" (Emphasis added.)

The discretionary authority of a district judge under prior law to exclude any class or group of persons (28 USC, former § 1863(b)) has not only been eliminated, but is expressly prohibited in the 1968 Act.

A new provision in the 1968 Act (§ 1867) establishes the procedure to be followed in both criminal and civil cases to challenge a grand or petit jury on the ground that it was not selected in conformity with the provisions of the Act. However, the Act leaves open the right to seek "vindication or enforcement" of laws prohibiting discrimination in the selection of juries in the specific areas set out in § 1862. Section 1867(e) reads in relevant part, as follows:

> "(e) . . . *Nothing in this section shall preclude any person* or the United States *from pursuing any other remedy*, civil or criminal, *which may be available for the vindication or enforcement of any law prohibiting*

discrimination on account of race, color, religion, sex, national origin, or *economic status* in the selection of persons for service on grand or petit juries." (Emphasis added.)

Petitioner sought the "vindication or enforcement" of § 1862 of the Act in its motion for a judgment notwithstanding the verdict or a new trial and on the appeal to the Court of Appeals. The Court of Appeals held that petitioner waived its right to object to the composition of the panel by standing silently by while members of labor organizations were "systematically excluded" from the jury panel. This is not a case of "systematic exclusion", but an unprecedented summary action of the district judge on his voir dire examination of the panel.

The Court of Appeals sought to support its opinion by reference to three of its own decisions decided under former and different statutes and involving different situations.

In *Joyner v. Berman Leasing Company*, 5 Cir., 1968, 388 F2d 875, 877, a challenge to the entire jury panel, on the ground that the prospective jurors were not chosen in accordance with federal law as defined by recent case authorities, was made orally after trial.

In *Stewart v. Banks*, 5 Cir., 1968, 397 F2d 798, 799, appellants asserted as error the systematic exclusion of Negroes from the jury panel, an issue which was not raised until their motion for a new trial.

In *Atlas Roofing Manufacturing Company v. Parnell*, 5 Cir., 1969, 409 F2d 1191, the statutory disqualification of one juror by reason of a previous conviction of a felony was not raised by appellants until after verdict. The Court of Appeals held that this was ground for

challenge by the defendant for cause, and if not seasonably exercised, the objection is waived.

The objection in this case was not a challenge to the entire jury panel nor to the statutory disqualification of a juror. It was a protest of the illegal action of the trial judge in practicing the discrimination prohibited by § 1862 by excluding a class of persons on the basis of their economic status.

The decisions relied upon by the Court of Appeals are of no aid, either as to fact or law, in the determination of the jury issue raised in this case.

The exclusion of all members of labor organizations was made by the District Judge on his own voir dire examination, and was discriminatory per se. The Act is broad as to the right to pursue any available remedy for the vindication or enforcement of any law prohibiting such discrimination, but silent in fixing a time in which action must be taken. To hold that the right is lost if not exercised before the trial commences, as the Court of Appeals held, would circumvent the policy and purpose of the Congress as expressed in the Act.

The Court of Appeals held that the petitioner waived its rights to object to the discriminatory action of the district judge. In *Schick v. United States*, 195 US 65, 24 S Ct 826, 49 LEd 99, 103 (1903), this Court held:

> "When there is *no constitutional or statutory mandate*, and *no public policy prohibiting*, an accused may waive any privilege which he is given the right to enjoy." (Emphasis added.)

This principle is stated affirmatively in *City of Glendale v. Coquat*, 52 P.2d 1178, 1180, 46 Ariz. 478, 102 A.L.R. 837 (1935) as follows:

"It is apparently universally held that where a right has been given to an individual not alone for his private benefit, *but as a matter of public policy*, in the interest of the state, *it may not be waived by anyone*." (Emphasis added.)

The prohibition of the statute against discrimination on account of economic status reflect the decision of this court in the civil case of *Thiel v. Southern Pacific Company*, 32 US 217, 66 S Ct 984, 90 LEd 1181, 1125 (1946) and the implementation by Congress of the principle stated therein as follows:

> Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an *individual* rather than a *group* or *class matter*. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. (Emphasis added.)

Through many years of court decisions followed by congressional acts the federal jury system has developed, with the result that in the 1968 Act the congressional purpose is disclosed fully, firmly and comprehensively. The policy of the United States is declared. Discrimination in specified areas is prohibited. Arbitrary exclusion of any class of persons is prohibited.

The opinion and judgment of the Court of Appeals is in conflict with and circumvention of the Jury Selection Act of 1968.

II. The Court of Appeals affirmance of the district court's instructions to the jury that Local 480, in its dispute with a primary employer at a common construction site, was under a legal duty to

seek out all employees and suppliers of secondary employers who refused to cross the union's picket line, which in all respects complied with Moore Dry Dock Standards, and instruct such employees and suppliers to return to work and to cross the union's picket line in order to avoid violating 29 USC § 158(b) (4) (i) (ii) (B) and in order to escape liability in damages pursuant to 29 USC § 187, was violative of the intent of the Congress to protect the union's traditional and permissible primary activity as announced in 29 USC §§ 157, and 163; and the decision below is also in conflict with federal labor policy, decisions in other circuits, and with the principles clearly established by this Court in particular in *Denver Building and Construction Trades Council* and *International Rice Milling Company.*

This case is one in which the instructions given to the jury by the trial judge violate the intent of Congress in enacting 29 USC §§ 157 and 163 and outlaw that conduct which is traditional and permissible in a primary action.

The Court of Appeals followed the reasoning of the trial judge that when a union puts up a "banner" it doesn't make any difference what legend is written on the sign, it is recognized as a barrier to union men who are going to refuse to cross the picket line (A.438-440). The union expects and hopes that most, if not all, union members will refuse to cross the picket line. Such being the case, both the district court and the Court of Appeals concluded it was therefore incumbent upon Local 480 to take affirmative action to negative the inducement which the mere existence of the picket line engendered. The district court instructed the jury that

Local 480 was under a legal duty to expressly seek out the employees and suppliers of the other employers who had contracts on the Tracetown project and who had refused to cross the picket line, which was peaceful and admittedly complied in all respects with the Moore Dry Dock Standards,[4] and to instruct such employees to return to work on the project and to instruct the suppliers to cross the picket line. The jury was instructed that if they found that Local 480 had failed to take this affirmative action then the jury was to find that the union had violated § 8(b) (4) (i) (ii) (B) of the NLRA as amended, and it was therefore liable in damages to Gulf Electric for its failure to seek out and instruct the employees to come to work and the suppliers to come on across the picket line and make their deliveries.

The NLRB has refused to follow the rule adopted by the Court of Appeals. In *Baltimore Building and Construction Trades Council and Local Union* 16, *International Association of Bridge, Structural and Ornamental Iron Workers Union AFL and John A. Piezonki, d/b/a Stover Steel Service*, Case No. 5-CC-29, June 28, 1954, 108 NLRB 1575 the Board said:

> ". . . The pickets conducted themselves strictly in accordance with their instructions. They made no attempt physically to bar the entry of employees into the project, nor did they accost or attempt to persuade employees not to enter or not to work. So far as is shown by the evidence, 1 or 2 pickets at each project simply patrolled the entrances, handed out authorization cards when requested, and answered inquiries by stating that the Council was conducting an

[4] *Sailors' Union of the Pacific, AFL* (Moore Dry Dock Company) 92 NLRB 547.

organizing campaign. The effect of the picketing was that most of the already unionized employees on the projects being picketed refused to cross the picket lines.

"The Trial Examiner found that the picketing violated Section 8 (b) (4) (A) of the Act. He reasoned that, although the Respondents did not call for such action by way of instructions, pickets, or picket signs, they expected that many union members would refuse to cross the picket line and it was therefore 'incumbent upon them to take affirmative action to negative the inducement which the mere existence of the picket line constituted, by ordering the men back to work.' We do not agree with this reasoning of the Trial Examiner. Logically applied, it would outlaw substantially all primary picketing. Yet the legislative history of Section 8 (b) (4) (A) is clear that by that section Congress intended to make unlawful only secondary boycotts and secondary strike activities and not conduct 'which was traditional and permissible in a primary action.' "

The Board reiterated this rule in *Brotherhood of Painters, Decorators and Paperhangers of America, Local Union No. 193, and District Council No. 38 of Brotherhood of Painters, Decorators and Paperhangers of America, affiliated with A.F. of L. and Pittsburg Plate Glass Company*, Case No. 10-CC-62, October 25, 1954, 110 NLRB 455.

The decision of the Court of Appeals conflicts with the rule established by the NLRB.

The result reached by the Court of Appeals in this case is in conflict with the principles clearly established by this court in *NLRB v. Denver Building & Construction*

Trades Council, 341 US 675, 687, and in *NLRB v. International Rice Milling Company*, 341 US 665, 671, 672. In Denver the court said:

"At the same time that §§ 7 and 13 safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, § 8(b) (4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else.

"A. We must first determine whether the strike in this case had a proscribed object. The conduct which the Board here condemned is readily distinguishable from that which it declined to condemn in the Rice Milling Case, ante, p. 1277. There the accused union sought merely to obtain its own recognition by the operator of a mill, and the union's pickets near the mill sought to influence two employees of a customer of the mill not to cross the picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill. It did not commit any unfair labor practice proscribed by § 8(b) (4)."

The decision of the Court of Appeals in affirming the action of the district court judge in his comments in the presence of the jury to the effect that every one knew that each of the labor unions respect the picket lines of the others and that there was no difference between objective and effect and the instructions to the jury that Local 480 had to instruct employees and sup-

pliers of secondary employers to cross the picket line, was also in conflict with the principles announced in *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO, v. NLRB et al*, 366 US 667, 672 wherein this court said:

> "Thus the section 'left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others . . .'
>
> "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. See Sailors' Union of the Pacific (Moore Dry Dock), 92 NLRB 547. '[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers.' Seafarers International Union v. NLRB, 105 App DC 211, 265 F2d 585, 590. 'It is clear that, when a union pickets an employer with whom it has a dispute it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises.' Id. 265 F2d at 591. 'Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success.' Local 294, supra (284 F2d at 890). But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing

which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer. NLRB v. International Rice Milling Co. 341 US 665, 95 Led 1277, 71 S Ct 961, supra."

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

28 USC §§ 1861-1869 in relevant part are as follows:

Amendments by Pub.L. 90-274 (1968)

Section 101 *of Public Law* 90-274, *approved March* 27, 1968, *entitled "An Act to provide improved judicial machinery for the selection of Federal juries, and for other purposes", amended the caption, analysis, and sections* 1861 *through* 1869 *of chapter* 121 *of Title* 28, *United States Code, to read as set out herein.*

Section 102 *of Public Law* 90-274 *amended sections* 1821 *and* 1871 *of Title* 28, *United States Code.*

Section 103 *of Public Law* 90-274, *repealed certain sections of the District of Columbia Code, and amended various sections pertaining to the District of Columbia, Puerto Rico, and the Canal Zone.*

Section 104 *of Public Law* 90-274, *provided: "This Act shall become effective two hundred and seventy days after the date of enactment* [*December* 22, 1968]: *Provided, That this Act shall not apply in any case in which an indictment has been returned or petit jury empaneled prior to such effective date."*

§ 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States.

and shall have an obligation to serve as jurors when summoned for that purpose.

As amended Sept. 9, 1957, Pub.L. 85-315, Part V, § 152, 71 Stat. 638; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

§ 1863. Plan for random jury selection

(b) Among other things, such plan shall—

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

(5) specify those groups of persons or occupational classes whose members shall, on individual request

therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.

As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

§ 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil

rights have not been restored by pardon or amnesty. As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

§ 1866. Selection and summoning of jury panels

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: . . . .

As amended May 24, 1949, c. 139, § 96, 63 Stat. 103; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting a grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or crimi-

nal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

As amended Sept. 2, 1957, Pub.L. 85-259, 71 Stat. 583; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

§ 1869. Definitions

For purposes of this chapter—

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, the race and occupation of a potential juror and any other matter not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form also shall elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall

not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his race, color, religion, national origin, economic status, or occupation is not a prerequisite to his qualification for jury service, and that such information need not be furnished if the person finds it objectionable to do so;

As amended Oct. 16, 1963, Pub.L. 88-139, § 2, 77 Stat. 248; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

29 USC §§ 157, 158(b) (4) (i) (ii) (B) and 163 are as follows:

"§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively* through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining* or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

"§ 158

(b). It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce *to engage in, a strike or a refusal in the course* of his

employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) *to threaten, coerce, or restrain any person engaged in commerce or in an industry* affecting commerce, where in either case an *object thereof* is—

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, *or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section* 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any *primary strike or primary picketing;* . . .

"§ 163. Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. July 5, 1935, c. 372, § 13, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151."

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1969

No. 28530

D. C. Docket No. CA 1285

GULF COAST BUILDING & SUPPLY COMPANY, INC., Plaintiff-Appellee,

versus

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 480, AFL-CIO, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi.

Before BELL, COLEMAN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be and the same is hereby, affirmed.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: June 19, 1970

APPENDIX C

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 28530

GULF COAST BUILDING & SUPPLY COMPANY, INC., Plaintiff-Appellee,

versus

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 480, AFL-CIO, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

---

(June 19, 1970)

Before BELL, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: Gulf Coast Building & Supply Company, Inc. (Gulf Coast) commenced this action under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, to recover damages from International Brotherhood of Electrical Workers, Local No. 480, AFL-CIO (Local 480). Gulf Coast was engaged as the general contractor for the construction of a shopping center. In this action it complained of the damages sustained by it as a result of picketing at the jobsite by Local 480. Gulf Coast alleged that the picketing violated the secondary-boycott section of

the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i) and (ii)(B), because its object was to force Gulf Coast to sever its contract with a nonunion electrical subcontractor and hire a union subcontractor instead. The jury returned a general verdict in favor of Gulf Coast in the amount of $38,349.78. The District Judge denied Local 480's motion for a judgment notwithstanding the verdict or a new trial, and the union appeals. Local 480 contends that the evidence does not support the jury's finding that it engaged in a secondary boycott or the jury's award of damages to Gulf Coast. Also, it argues that the jury was improperly constituted and that the District Court's jury instructions were erroneous. We affirm.

Gulf Coast, as general contractor, began construction of the Tracetown Shopping Center (Tracetown Center) in Natchez, Mississippi, in December 1966. On January 20, 1967, Erickson, the Business Manager of Local 480, wrote a letter to St. John, the Project Manager of Gulf Coast at the Tracetown Center site, stating that Local 480 would appreciate Gulf Coast's "careful consideration of awarding subcontractors to qualified contractors who abide by the State and Federal approved apprenticeship training program and pay the prevailing wage scale in this area [Natchez]." A list of "electrical contractors who have agreements with Local 480" was enclosed. Gulf Coast awarded the plumbing work to Wood Mechanical of Jackson, Mississippi, and the electrical work to Gulf Electric Construction Company (Gulf Electric) of Crestview, Florida. Gulf Electric was not a union employer, having no agreement with Local 480. At the Tracetown Center site Gulf Coast employed mechanics and laborers from the Natchez area. Some of these employees were obtained

through the Carpenter's Local, the Masonry Local, and the Laborer's Local.

On February 28, 1967, Local 480 began picketing the single entrance gate to the construction site. The union claimed that its dispute was solely with Gulf Electric, the dispute being that Gulf Electric did not pay area wage scales or follow area working standards adhered to by union electrical employers, thus undermining those scales and standards. According to the union, the sole purpose of the picketing was to pressure Gulf Electric into meeting the area scales and standards. Local 480, however, did not contact Gulf Electric before the picketing began. The pickets carried signs consistent with the union's avowed purpose of picketing at the Tracetown Center site. The pickets were instructed not to say anything to persons inquiring about the picket line, but to have them read the signs.

Before establishing the picket line, Erickson informed several local unions affiliated with the Building Trades Council that Local 480 was going to picket at the Tracetown Center. Erickson knew that it was the general policy of unions affiliated with the Council not to cross picket lines, and he hoped that their members would not cross Local 480's line. Local 480 commenced picketing in the mornings before Gulf Coast people were due to arrive so that they would recognize the line and stay off the job.

On February 28, the day picketing began, Gulf Coast's Project Manager questioned Erickson about the cause of the picketing. Erickson, mentioned the letter he had written on January 20, told the Project Manager to read the picket sign. On the same day, Worley, a vice president of Gulf Coast, met Erickson by chance and asked him why Local 480 was picketing. Erickson

replied that he had told the Project Manager to read the sign, that he did not want to discuss the matter with Worley, and that his lawyer would contact Worley. Later, Erickson's lawyer informed Worley and the president of Gulf Coast that "you people are undermining us and we're protesting."

The picketing lasted, with one short break, until June 23, 1967, when it was voluntarily stopped. Until March 14, the pickets patrolled at the single entrance to the construction site. On that date Gulf Coast constructed a second entrance for use by everyone but Gulf Electric and persons doing business with Gulf Electric, who continued to use the original gate. Local 480 kept an account of persons using the new gate, and the pickets continued to patrol the original gate, which was eliminated in June. During the course of the picketing, some employees of Gulf Coast and of subcontractors other than Gulf Electric, as well as persons delivering supplies to the site, refused to cross the picket line.

The break in picketing occurred after Worley, on the morning of March 22, informed Erickson of a proposal to have Wood Mechanical, a union employer, employ the electrical labor. At Worley's request, Erickson removed the line. The proposal was not effected, however, and the picketing resumed on March 23. Also on March 23, at a meeting arranged by Worley among himself, Erickson, and a representative of Gulf Electric, Gulf Coast and Gulf Electric offered to arrange the payment of Local 480's prevailing wage scale and compliance with the prevailing working standards. Erickson stated that he would have to discuss the matter with his lawyer. He was not heard from again.

The picket line had these effects on Gulf Coast's operations at the Tracetown Center site: The job was shut

down from February 28 through March 2, except for electrical work being performed by Gulf Electric. Gulf Coast was unable to obtain local replacements. It did obtain masons from New Orleans, Mobile, and Pensacola, but no plumbers, except for the owners of Wood Mechanical, reported to work from February 28 until March 15. Gulf Coast rented equipment to batch concrete, but, except for deliveries made on March 22, concrete was not delivered to the site until March 31. In addition, Gulf Coast added further direct supervision, assigned administrative personnel, took over the work of subcontractors, rented additional equipment, and worked overtime to make up for the time lost because of the picketing. As a result of the lack of progress made toward completion of the shopping center, the construction lender refused to disburse loan funds until Gulf Coast obtained a completion bond, which cost $10,750. Gulf Coast incurred and paid attorney's fees and expenses amounting to $4,750.85 to effect resumption of work and employed guards for the protection of its property and equipment at the jobsite. Gulf Coast's accountant, under the supervision and with the assistance of Worley and Gulf Coast's president, prepared a schedule of some of the expenses incurred by Gulf Coast in attempting to overcome the effects of the picketing. The contract price for construction of Tracetown Center was $1,250,000. The actual cost of construction was $1,296,000, or $46,000 more. Most of the shopping center was completed by September 1, 1967, the scheduled completion date. This lawsuit followed.

We conclude that the judgment of the District Court must be affirmed. There is sufficient evidence in the record to support the jury's finding that Local 480's actions amounted to a secondary boycott in violation

of National Labor Relations Act § 8(b)(4)(i) and (ii)(B), 29 U.S.C. § 158(b)(4)(i) and (ii)(B). *See International Bro. of Elec. Wkrs., Local* 480 *v. N.L.R.B.*, D. C. Cir., 1969, 413 F. 2d 1085, *enforcing* 172 N.L.R.B. No. 64 (June 26, 1968). There is also ample evidence to support the jury's award of damages. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248 (1931); *Sheet Metal Wkrs. Int. Ass'n. Loc. 223 v. Atlas Sheet Metal Co.*, 5 Cir., 1967, 384 F. 2d 101. Local 480 has complained too late about the composition of the jury. *E. g., Stewart v. Banks*, 5 Cir., 1968, 397 F. 2d 798. Finally, we are satisfied that the District Court's instructions to the jury did not confuse or mislead it regarding principles of law applicable to this case. *Cf. Delancey v. Motichek Towing Service, Inc.*, 5 Cir., 1970, ... F. 2d ..... [No. 27401, June 1].

I.

If Local 480's sole object was to force Gulf Electric to pay area standards, and its actions were not intended to pressure neutral employers such as Gulf Coast to cease doing business with Gulf Electric and were reasonably limited to accomplish its primary object, then Local 480's actions did not constitute a secondary boycott. If, however, Local 480 did have the purpose of forcing Gulf Coast to sever its ties with Gulf Electric, and its picketing was designed to accomplish that purpose, its actions amounted to a secondary boycott in violation of National Labor Relations Act § 8(b)(4)(i) and (ii)(B), 29 U.S.C. § 158(b)(4)(i) and (ii)(B), and it may be held liable to Gulf Coast. Labor Management Relations Act § 303, 29 U.S.C. § 187. *See International Bro. of Elec. Wkrs., Local* 480 *v. N.L.R.B.*, D. C. Cir., 1969, 413 F. 2d 1085, 1087.

In Sailors' Union of the Pacific [Moore Drydock], 92 N.L.R.B. 547 (1950), the Labor Board established guidelines for picketing one subcontractor at a common construction site. Four standards for picketing in common suits situations would be considered presumptive of valid primary activity:

> ". . . (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer. These tests were widely accepted by reviewing federal courts. . . ."

Local 761, *Inter. U. of E., R. & M. Wkrs. v. N.L.R.B.* [*General Electric*], 366 U.S. 667, 677, 81 S. Ct. 1285, 1291 (1961). In this case, Gulf Electric, the primary employer, was engaged in its normal business on the premises of Gulf Coast, the secondary employer. The picketing was limited to the single gate used by Gulf Electric and persons doing business with Gulf Electric. The picket signs stated clearly that the dispute was only with Gulf Electric. Thus the *Moore Drydock* guidelines were followed by Local 480. Formal compliance with these guidelines, however, does not mean that picketing with a secondary object can be done lawfully, for there remains for the trier of fact in section 303 cases, as for the Labor Board in unfair union labor practice cases, the determination whether picketing has gone beyond the union's avowed primary purpose. *See, e. g., International Bro. of Elec. Wkrs., Local* 480 *v. N.L.R.B.*, D. C. Cir., 1969, 413 F. 2d 1085, 1089; *N.L.R.B. v. Northern Cal. Dist. Coun. of Hod Carriers, etc.*, 9 Cir., 1968, 389 F. 2d 721, 725.

Determining the legality of the very union practices in issue here, the Labor Board found, on June 26, 1968, that Local 480's picketing at the Tracetown Center site went beyond the union's avowed primary purpose and was aimed at Gulf Coast, with the object of forcing Gulf Coast to replace Gulf Electric as the electrical subcontractor. 172 N.L.R.B. No. 64. On April 16, 1969, the District of Columbia Circuit ordered enforcement of the Labor Board's order. *International Bro. of Elec. Wkrs., Local* 480 *v. N.L.R.B.*, D. C. Cir., 1969, 413 F. 2d 1085. The Court stated:

> "The Board concluded that the union's equivocal responses to offers aimed at meeting the union's demand for area standards, plus the union's clear and quick response to the suggestion that Gulf Electric be replaced by a union employer, indicated that the union's picketing was aimed at Gulf Coast, with the object of forcing Gulf Coast to replace Gulf Electric. The Board took the position . . . that when such an object can be shown in a common situs picketing situation, a violation of the Act is made out despite the union's formal compliance with the *Moore Drydock* guidelines. We agree."

Id. at 1088-1089.

We have carefully reviewed the extensive record in this case. For the reasons found persuasive by the District of Columbia Circuit, we conclude that the jury was warranted, after viewing the dispute at first hand, in finding that Local 480 committed a secondary boycott, thus subjecting itself to liability to the secondary employer, Gulf Coast.

II.

Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, permits any person injured in his business or property as a result of a secondary boycott to bring an action to recover the damages he has sustained, plus the costs of the suit. The statute is compensatory in nature, *Local 20, Teamsters, etc., Union v. Morton*, 377 U. S. 252, 84 S. Ct. 1253 (1964), and damages may be recovered only for actual losses sustained as a result of the unlawful secondary activity. *Sheet Metal Wkrs. Int. Ass'n, Loc. 223 v. Atlas Sheet Metal Co.*, 5 Cir., 1967, 384 F. 2d 101, 109. Although the employer must prove that he has suffered some injury to his business or property, he need not detail the exact amount of damages suffered; it will suffice if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result may be only approximate. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248 (1931); *International U. of Op. Eng., Local 653 v. Bay City Exec. Co.*, 5 Cir., 1962, 300 F. 2d 270, 272.

In this case we are of the opinion that the District Judge did not abuse his discretion by allowing the jury's award of damages to stand over Local 480's motion for a judgment notwithstanding the verdict or a new trial. The summaries prepared by Gulf Coast's accountant and other evidence sufficiently showed the probable amount of damages sustained by Gulf Coast to warrant the jury's finding that $38,349.78 was the extent of those damages, as a matter of just and reasonable inference.

III.

Local 480 argues that the District Court erred in excusing for cause from the jury panel all persons who

were members of any labor organization. This objection to the composition of the jury panel was first made in the union's motion for a judgment notwithstanding the verdict or a new trial. Such a post-trial allegation, standing alone, does not constitute evidence reviewable by this Court. *Joynor v. Berman Leasing Company*, 5 Cir., 1968, 398 F. 2d 875, 877. Moreover, we have held that a party to a civil action waives his right to object to the composition of the panel when he fails to make his objection before the trial commences. *Stewart v. Banks*, 5 Cir., 1968, 397 F. 2d 798, 799. We reasoned in Stewart that

> "[i]f a civil litigant is permitted to go to trial and ascertain the verdict of the jury, and if the verdict be adverse to his position, then for the first time raise some question concerning the manner in which the jury lists in the Court are composed, and if it should be determined that there was some imperfection in the jury lists, this would mean that the litigant, by deliberately failing to make timely objection had had two opportunities to have his case presented to a jury."

Id. *See also Atlas Roofing Manufacturing Company v. Parnell*, 5 Cir. 1969, 409 F. 2d 1191. This reasoning is especially applicable to this case, in which a union local informs us that it stood silently by while members of labor organizations were "systematically excluded" from the jury panel. Local 480 may properly be held to have waived its rights under the circumstances.

IV.

Local 480's objections to the District Judge's charge to the jury must be rejected. In reviewing the claim of

an alleged infirm instruction, we are guided by the general rule that the charge

> "'. . . should be taken as a whole and read in its entirety; that is, each instruction must be considered in connection with others of the series referring to the same subject and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, there is no just ground of complaint, even though an isolated and detached clause is in itself inaccurate, ambiguous, incomplete or otherwise subject to criticism.'"

Delancey v. Motichek Towing Service, Inc., 5 Cir., 1970, ___ F. 2d ___ [No. 27401, June 1], *citing Nolan v. Greene*, 6 Cir., 1967, 383 F. 2d 814, 816. Our function is to satisfy ourselves that the instructions, viewed with "orbitary and universal" scrutiny, *McDaniel v. Slade*, 5 Cir., 1968, 404 F. 2d 607, 609, "show no tendency to confuse or mislead the jury with respect to the principle of law applicable." *Allers v. Bohmker*, 7 Cir., 1952, 199 F. 2d 790, 792.

In this case we are satisfied that the District Judge's instructions on the issue whether Local 480's picketing was primary or secondary activity, "viewed, if necessary, through corrected lenses," *Delancey v. Motichek Towing Service, Inc.*, 5 Cir., 1970, ___ F. 2d ___ [No. 27401, June 1], properly expressed the law applicable to the issues in dispute.

We perceive no basis for upsetting the jury's verdict in favor of Gulf Coast.

AFFIRMED

APPENDIX D

Labor Cases—Cited 60 LC

Gulf Coast Building & Supply Co., Inc., v. Electrical Workers (IBEW), Local 480

[¶ 10,330] Gulf Coast Building & Supply Company, Inc., Plaintiff v. International Brotherhood of Electrical Workers, Local No. 480, AFL-CIO, Defendant.

United States District Court, Southern District of Mississippi. Civil No. 1185. July 29, 1969.

National Labor Relations Act

Secondary Boycotts—Cessation of Business as Object—Evidence of Unlawful Objective.—A union engaged in unlawful secondary boycott activity when it picketed a non-union subcontractor to compel a general contractor to cease doing business with the subcontractor. Although the signs at the pickets showed that the union had staged the picketing to protest substandard wages and conditions of the subcontractor, the evidence indicated that the real objective was to induce employees of the subcontractor to take concerted action against their employer. NLRA, Section 8(b)(4).

Back reference.—¶ 5220.0701.

Secondary Boycotts—Damages—Measure of Damages.—A secondary employer that sustained damages due to an unlawful secondary boycott by a union was allowed to recover the amount of $36,349.78 as actual damages. There was substantial evidence to support the verdict of the jury as to the amount awarded. NLRA, Section 8(b)(4).

Back reference.—¶ 5255.61.

E. C. Ward and R. Brent Forman, Laub, Adams, Forman & Truly, Natchez, Mississippi, for Plaintiff.

Dixon L. Pyles, Pyles & Tucker, Jackson, Mississippi, for Defendant.

[*Statement of Case*]

Cox, D. J.: The plaintiff sued the defendant under 29 U.S.C., 1952 Edition, Section 187 [1] (often referred to as Section 303, Title III) for an unfair labor practice as proscribed by 29 U. S. C., 1964 Edition, Section 158. [2] A jury awarded the plaintiff a verdict in the amount of $38,349.78 on April 23, 1969. The defendant on April 29, 1969 filed its motion for a judgment notwithstanding the verdict, or in the alternative for a new trial, assigning twenty-one grounds therefor. The plaintiff's proof showed a loss of $46,000.00.

[*Facts*]

In view of the jury verdict, it is proper that the facts be stated most favorably to the victorious litigant. Only a brief statement of facts is necessary for a proper disposition of this motion. The plaintiff (an Alabama corporation) was engaged in the construction of a shopping center known as Tracetown Center on Highway 61 bypass in Natchez, Mississippi. All of the general contractors' employees and all of the mechanical contractors' employees engaged in the construction of this site and buildings were union members. The electrical contractor on this job was non-union and one of the objec-

[1] 29 U. S. C., 1952 Edition, Section 187 (often referred to as Section 303, Title III) authorizes a suit in federal court for a secondary boycott of an activity affecting commerce.

[2] 29 U. S. C., 1964 Edition, Section 158 makes it an unfair labor practice for a labor organization or its agents: (4)(1) To induce or *encourage* any individual employed by any person engaged in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where an object of such action is to force or coerce the joining of the union.

tives, if not the sole object of defendant's activity on this job which precipitated this suit, was to force plaintiff to expel this non-union subcontractor off this job. There was a main entrance to this job used by all crafts when defendant started its picket line at that gate on February 28, 1967 and kept such pickets there with their banners through June 23, 1967. The picket banner had written on it: "No dispute with any other employer IBEW, Local 480—protests substandard wages and conditions of Gulf Electrical Construction Company, Inc., electrical contractor. No dispute with any other employer." The pickets were instructed to say nothing to anybody and when asked about the picket sign to refer to the sign without comment.[3] The banner was not an

[3] The sign or banner carried by the pickets said it was directed only at the electrical contractor, but when interrogated about such activity, the picket would say: "Read the sign," or he would say nothing. That conduct did nothing toward dissipating the normal appeal of a picket line. In *Superior Derrick Corporation v. NLRB*, [39 LC ¶ 66,133] (5 CA) 273 F. 2d 891, 896-7, cert. denied 364 U. S. 816, it is said: "The primary union may hope that from the publicity other unionists may reach the decision that they as individuals do not wish to work under such circumstances. To this extent the Act affords no insulation against the pressures which might be generated on the primary employer. But if there is an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take concerted action so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity." Cf. *NLRB v. International Rice Milling Co.*, [19 LC ¶ 66,346] 1951, 341 U. S. 665, 71 S. Ct. 961, 95 L. Ed. 1277. It is not, as the *Moore Drydock* doctrine phrased it, merely a question of negativing the existence of a dispute with the secondary employer. The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line is overcome. It must be done so that all secondary employees will know that the primary union does not seek what the law forbids—pressure on the primary employer through pressure from the secondary employer because of concerted pressure of secondary employees on that secondary employer. *NLRB v. Laundry, etc. Drivers, Local* 928, [36 LC ¶ 65,132] 9 Cir., 1958, 262 F. 2d 617, and *Retail Fruit & Vegetable Clerks' Union etc. v. NLRB*, [33 LC ¶ 71,085] 9 Cir., 1957, 249 F. 2d 591, 599. The law forbids such pressure whether the means be crude or sophisticated. The prohibition is continuous from the outset to the end. *Local* 74 *etc.* [*Carpenters*] *v. NLRB*, [19 LC ¶ 66-349] 1951, 341 U. S. 707, 714, 1316, 71 S. Ct. 966, 970, 95 L. Ed. 1309. Neither signs nor papers nor pamphlets nor silence automatically insulate the activity." Cf. *NLRB v. Building Service Employees International Union, Local No.* 105, [54 LC ¶ 11,512] (10 CA) 367 F. 2d 227.

informational sign which was calculated to fully inform an employee of a secondary employer and make him know that the picket line was not a barrier to his crossing.[4]

[Union Conduct Showed Unlawful Objective]

There is abundant evidence in this record from which a trier of facts could properly infer and conclude an intent on the part of this union to encourage, if not compel, plaintiff to submit through necessity to a dismissal of the electrical subcontractor so as to enable the other suppliers of material and services by other subcontractors to complete their work for the plaintiff.[5] The picket sign said that the dispute was with the electrical contractor only, but mute evidence belied that statement and defendant neither did nor said anything to advise anybody at the scene of this picket that they did not desire to accomplish an unlawful result. The pickets requested one supplier not to cross the line and he did not. Another supplier requested of the picket as to the meaning and purpose of the banner and was simply told to read the banner. That was simply not sufficient under the facts and circumstances in this case

[4] In *National Labor Relations Board v. Denver Building and Construction Trades Council*, [19 LC ¶ 66,347] 341 U. S. 675, 71 S. Ct. 943, there was a finding in that case that an object of the strike was to force the contractor to terminate the contract with the electrical subcontractor. The Court said that this was a proscribed object saying: "We hold that a strike with such an object was an unfair labor practice within the meaning of § 8(b)(4)(A)."

[5] "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend that all persons will honor the picket line, and that hope encompasses employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises. Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever motives there may be and however small the chances of success. * * * In the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent." *Local 761 International Union of Electrical Radio and Machine Workers v. NLRB*, [42 LC ¶ 16,966] 81 S. Ct. 1285.

to preclude an action for violation of the National Labor Relations Act.[6]

There was more than substantial evidence before the jury to support their finding and conclusion that at least one object of the picketing on this occasion was to force a cessation of business. There is sufficient evidence in this record to support the verdict of the jury as to the amount awarded.[7]

Lastly, the defendant criticizes several instructions granted the plaintiff and some instructions given the defendant which were used as modified by the Court. It is the view of this Court that these instructions taken as a whole properly advised the jury as to the applicable law in this case. The verdict in this case is large but it is not excessive or shocking and finds substantial support in the evidence in this case.

The motion for a judgment notwithstanding the verdict of the jury is without merit. The alternative motion for a new trial is likewise without merit. The motion in its entirety in both respects will be overruled.

A judgment accordingly has been prepared and entered by the Court.

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[6] *Aircraft & Engine Maintenance and Overhaul, Building, Construction, etc. v. Oolite Concrete Co.*, (5 CA) [51 LC ¶ 19,479] 341 F. 2d 210.

[7] In *Sheet Metal Workers International Association, Local Union No. 223 v. Atlas Sheet Metal Company of Jacksonville*, [56 LC ¶ 12,125] (5 CA) 384 F. 2d 101, it is said: "While the employer must prove that he has sustained some injury to his business or property, he need not detail the exact amount of damages suffered. It is sufficient if the evidence supports a just and reasonable approximation. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L.Ed. 544 (1931)."

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action Number 1185

GULF COAST BUILDING AND SUPPLY COMPANY, INC. Plaintiff

V.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 480, AFL-CIO Defendant

JUDGMENT

This cause this day coming on to be heard and the parties appearing in person and by counsel announced ready for trial, whereupon came a jury composed of Jimmy H. Allen and eleven others duly selected, impaneled and sworn according to law to try the issues first joined; and the Court having heard all of the testimony and received all of the evidence adduced by the parties, the jury retired under proper instructions of the Court to consider of their verdict, and presently returned into open court the following verdict:

"WE, THE JURY, FIND FOR THE PLAINTIFF (GULF COAST BUILDING AND SUPPLY COMPANY, INC.) AND ASSESS ITS DAMAGES AT $38,349.78"

which said verdict was duly received, entered and filed in open court as the verdict of the jury.

IT IS, THEREFORE, ORDERED AND ADJUDGED by the Court that said defendant is indebted to said plaintiff in said amount, and that Gulf Coast Building

and Supply Company, Inc., as plaintiff, do have of and recover from said defendant (International Brotherhood of Electrical Workers, Local No. 480, AFL-CIO) in the said sum of $38,349.78, plus 6% interest thereon from the date of the filing of this suit until paid, together with all costs to be taxed as provided by law, and for all of which proper process may issue.

ORDERED AND ADJUDGED, this April 28, A. D., 1969.

HAROLD COX

United States District Judge